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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 245

HERMAN TALLER,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Herman Taller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on May 1, 1968.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix A hereto, *infra,* is not yet reported.

Jurisdiction

The judgment of the United States of Court of Appeals for the Second Circuit was entered May 1, 1968 (Appendix B hereto, *infra*). The time for filing a petition for certiorari has been extended, by order of Mr. Justice Harlan,

to and including June 28, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner was convicted of mail fraud, Food and Drug Law violations and conspiracy relating to a weight-reducing preparation. The indictment contains 49 counts. The jury acquitted on 37 counts and convicted on 12 counts, including the conspiracy count on which the jury convicted "as a misdemeanor". The conspiracy count re-alleged by reference all of the substantive counts. All of the substantive counts on which the jury convicted were felony counts. The questions are:

1. Since the trial Court expressly instructed the jury that they could convict on the conspiracy count "as a misdemeanor" only if they convicted on the Food and Drug Law counts (misbranding) alone, and only if the misbranding convictions were "as a misdemeanor"; and since the jury actually convicted on seven felony counts of mail fraud in addition to three "felony" ("as charged") counts of misbranding, is not the verdict of "misdemeanor" conviction on the conspiracy count so hopelessly irrational as to negate that the jury performed a judicial fact-trying function at all in a manner which can be tolerated at all under basic tests of what the judicial process requires, especially in trials for crime? Did not this irrational conduct of the jury vitiate the entire due process adjudicative process in the case?

2. Both as a factor to be considered in conjunction with the jury's evidently irrational conduct above mentioned, and as a factor constitutionally aggrieving in itself, did not the overwhelming duplicity or rather multiplicity of the

48 counts, all of which involved but a single basic subject matter of alleged fraudulent marketing of a weight-reducing preparation, plus the circumstance that petitioner has been subjected to multiple and cumulative punishments, give rise to a violation of petitioner's rights under the due process and double-or-multiple punnishment protections of the Constitution?

3. Supplementing question 2, above, has it not come about through Federal Court of Appeals decisions of re-recent years that the prosecutive-proof procedures for conspiracy and substantive counts are now so practically equated that the combining of such counts is indeed duplicitous when the same subject matter is involved in the several counts of the indictment?

4. Was it "plain error" for the trial Court to fail to instruct the jury that the prosecution's expert testimony in a case of this type must demonstrate a "universality of scientific belief" in order to justify the conclusion that there was an intent to deceive (*Reilly* v. *Pinkus*, 338 U.S. 269, 276)?

5. Both in conjunction with question 4, above, and as a distinct question for certiorari, was petitioner denied a fair trial and due process of law by the facts that after the Government had committed itself pretrial not to try the case on the issue of the scientific validity of petitioner's basic nutritional theory involving use of polyunsaturated fats (e.g., Safflower Oil), but to confine its attacks to other alleged misrepresentations concerning certain recommended dosages in capsule form, the Government nevertheless introduced at the trial a large amount of expert medical testimony attacking the basic nutritional theory?

6. In the particular circumstances of this case was it "plain error" for the trial Court to fail to instruct the jury, in accordance with "the better practice" (*Holmgren* v. *United States,* 217 U.S. 509, 523-524), that in weighing the accomplice testimony in this case (which was indispensable for conviction), the jury should "require corroborating testimony before giving credence to" the accomplice witnesses (*ibid*)?

Constitutional and Statutory Provisions Involved

The case involves the Fifth Amendment (due process of law, double jeopardy or punishment) of the United States Constitution. It also involves 18 U.S.C. §§ 2, 371 and 1341; and 21 U.S.C. §§ 331(a), 331(k), 333(b) and 352(a). These statutory provisions are printed in Appendix C hereto, *infra.*

Statement of the Case

1. Introductory

The judgment of the United States Court of Appeals for the Second Circuit which is here sought to be reviewed, affirmed a judgment of the United States District Court for the Eastern District of New York (Dooling, D.J. and a jury) convicting petitioner Taller of mail fraud offenses, Food and Drug Law offenses (misbranding) and conspiracy, in connection with a weight-reducing preparation known as CDC ("Calories Don't Count") capsules. The indictment contained forty-five mail fraud counts, of which the jury convicted on eight and acquitted on thirty-seven; three Food and Drug Law (misbranding) counts, on all of which

the jury convicted; and one conspiracy count, on which the jury convicted "as a misdemeanor".

Taller was sentenced as follows: a committed fine of $1,000 on each of the mail fraud counts 1 to 6 inclusive and on the misbranding count 46, totalling $7,000; imposition of sentence was suspended as to mail fraud counts 11 and 25, misbranding counts 47 and 48, and on the conspiracy count (count 49), and Taller was placed on probation for two years.

Petitioner Herman Taller is a physician. Some years ago he developed a method of treating obesity using Safflower Oil, which has the property of aiding the elimination of excess body fat when used in a prescribed manner. Dr. Taller wrote a book about this theory, entitled "Calories Don't Count", published by Simon & Schuster. During the months preceding the publication of the book, several persons, including co-defendants under this indictment, learned about the forthcoming book and became interested in commercialized Safflower Oil in capsule form. In the form in which it was published, the book contained statements referring to "CDC" *capsules* and the name of a distributor of such capsules, and that a dosage of four to six of these capsules per day was recommended. However, six such capsules would supply only one-fifteenth of the quantity of safflower oil which Dr. Taller had recommended in manuscript and pre-publication proofs of the book, where he had recommended three ounces of safflower oil per day; it would require ninety of the CDC capsules to supply the three ounces. The central factual issues at the trial were whether the changes which appeared in the book as published had been made with Dr. Taller's culpable knowledge

or authorization, and whether the subsequent labelling and advertising of the capsules alleged to contain various false and fraudulent representations were chargeable to Dr. Taller as a participant. Dr. Taller took the stand at the trial.

Dr. Taller was tried alone in this trial, the indictment having been dismissed as to the other defendants except the corporate manufacturer of the capsules, which pleaded guilty to one count of mail fraud. The other defendants were permitted to plead to a superseding information and were fined (Tr. Feb. 2, 1967, pp. 5-7). The individual co-defendants testified for the Government in this trial.

2. Further Details as to the Indictment Charges

The indictment (14a)* named as defendants Herman Taller, Harry Bobley, Edward Bobley, F. Kenneth Beirn, Cove Vitamin & Pharmaceutical, Inc., a corporation, and GDC Pharmaceutical, Inc., a corporation.**

The mail fraud counts alleged violation of 18 U.S.C. §§1341 and 2 by false claims of efficacy for the recommended dosage of CDC capsules. Of the forty-five mail fraud counts (counts 1 through 45) the first six (counts 1 through 6) were identical except that each charged a distinct mailing to respective stated addresses in Brooklyn, New York. Mail fraud counts 7 through 45 were identical with counts 1 through 6 except for alleging respective mailings from within the Eastern District of New York.

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* " a" refers to the appellant's printed appendix in the Court below. Citations to non-printed portions of the Record will appear as "R. ".

** The latter corporation is the one which pleaded guilty to the present indictment prior to this trial.

Paragraph 4 of Count 1 and of all of the other mail fraud counts was eliminated from the case at the trial for failure of proof.

The bill of particulars (R. 4136-4166) as to the mail fraud counts stated that the date when it is alleged the defendant Taller caused to be inserted in the book "Calories Don't Count" references to safflower oil "capsules" and to "Cove Pharmaceutical, N. Y." as a source of such capsules, was between June and July 1961, and that the "ultimate place" where Dr. Taller had done so was "Simon & Schuster, Inc., 640 Fifth Avenue, New York, N. Y."; and stated that Dr. Taller was the person who instructed or directed the publisher of the book to make the latter insertions and references and that he had done so orally.

By stipulations all of the routine proofs as to the actual mailings were conceded at the trial, but without conceding that Dr. Taller personally participated therein or had any responsibility therefor.

The Food and Drug counts (Counts 46 through 48), on all of which Dr. Taller was convicted by the jury "as charged",* are as follows: Counts 46 and 47 charged mislabelling or "misbranding" in connection with two respective interstate commerce shipments of CDC Capsules. The counts were identical except for the consignee and dates of shipment. These counts alleged violations of 21 U.S.C. §§ 331(a), 333(b), 352(a); 18 U.S.C. § 2; and they referred also to 21 U.S.C. § 321(m).

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* As will appear, the Court instructed the jury that on these 3 counts they could convict either "as charged" (felony) or "as a misdemeanor". Extreme peculiarities result from the "as charged" convictions on the three Food and Drug counts when considered together with the rest of the verdict (details *infra*).

Count 48, the third of the Food and Drug Act Counts, charged a "repacking" by the defendants of cartons of "a drug consisting of safflower oil and Vitamin B-6", with intent to defraud and mislead in violation of 21 U.S.C. §§331 (k), 333 (b).

Count 49, the conspiracy Count, based on the general conspiracy statute (18 U.S.C. §371), was in effect a recharging of all 48 of the substantive counts, both mail fraud and misbranding, alleged in words of a charge of conspiracy. The overt act allegations consisted of a reallegation of the 48 substantive counts, and that "on or about July 18, 1961, the defendants had a conversation at the University Club, New York, New York, concerning the sale, promotion and distribution of safflower oil capsules".

3. The Trial Proofs

The Government's theory of the case, as given in the prosecutor's opening (R. 50 *et seq.*) was: Dr. Taller had a manuscript which he showed to Richard L. Grossman, a vice-president of Simon & Schuster, early in 1960. Grossman was very interested. Roger Kahn, a ghost writer was engaged by a literary agent of Taller, Jaffe, to help with the book. The Taller-Kahn manuscript was delivered to Grossman on December 31, 1960. The Simon & Schuster people were enthusiastic, they were sure of an exceptional best-seller, mainly because Dr. Taller's theory allowed fat people to eat fatty and fried foods using unsaturated fat in safflower oil as a body chemistry device to get rid of unwanted body fat. In June 1961 Taller showed Grossman some very large capsules made by "two boys from Brooklyn"—these were the Bobley defendants (*infra*)—

and Taller said capsules could be used for his safflower regimen instead of unpalatable liquid. In July 1961 Taller proposed to Grossman changes in the book, then not yet published, to include that safflower oil capsules could be used and that they could be obtained from a named distributor. Grossman approved. Taller asked Grossman to send printed proof of the book to Kenneth Beirn, who would arrange for the writing up of the changes. Grossman was about to leave for Europe, so he had his assistant, Miss Jill Kneerim, send the proof to Beirn and instructed her to work in Beirn's changes from a book-production or final printing standpoint. This was around the middle of July 1961. On July 21, 1961 there was a meeting at the University Club of Beirn, the Bobley brothers, Dr. Taller, Milton Stone and others, the participants agreeing on details of the makeup of the capsules, how they should be taken by users, and how the book should be changed accordingly. Later that afternoon, July 21, 1961, Dr. Taller and Milton Stone went to Grossman's office, Miss Kneerim received them (Grossman having left for Europe), Taller said that Stone had the changes for the book and would give them to Miss Kneerim as Taller had to leave immediately, and then Miss Kneerim and Stone worked in the changes, which the young lady then sent to the printer. Grossman returned from Europe around September 9, 1961, the book having meanwhile been published, containing references to capsules and to Cove Pharmaceutical in New York as a distributor. Meanwhile (still according to the Government's theory) the Bobley brothers, who ran Cove as an established business, together with Beirn, Dr. Taller and others were preparing to form a new business to promote the

capsules, hoping to benefit from the expected success of the book. A new company was formed, CDC Pharmaceutical, Inc., the Bobleys taking 51 per cent of the stock, Beirn receiving some stock, and Dr. Taller receiving some in the name of a trust for his children. After Grossman had returned from Europe as aforesaid in September 1961 he had conferences with the Bobleys about the possibilities of promoting the capsules and the book together. Disagreements developed, and ultimately Simon & Schuster protested against the Bobleys' promotional and advertising methods. In January 1962 Grossman became very upset about the capsules when he figured out that they contained only a small fraction of the daily three ounces of safflower oil mentioned in the book as originally drafted. Grossman confronted Dr. Taller with this. Dr. Taller was evasive, he first said the program was alright because the capsules were intended to be used along with the safflower oil used for frying food, then he said it was all the Bobleys' fault. Such, in essence, was the Government's theory of the case, together with proof (undisputed) that the CDC capsules were insufficient to supply three ounces of safflower oil daily. The Government also attacked Dr. Taller's whole theory of weight control using unsaturated facts such as safflower oil—although pre-trial the Government had disavowed any such attack or that the indictment allowed such.*

In Grossman's testimony at this trial he told, on direct examination, substantially the story outlined in the Government's theory of the case as above summarized (R.

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* This switch by the Government gives rise, we contend, to an issue of prejudicial error (*infra*).

159 *et seq.*). However, on cross-examination Grossman revealed that Dr. Taller had not been present at any of Grossman's numerous meetings with the Bobleys concerning promotion of the capsules in connection with the book (R. 524); that he (Grossman) had been rather ardently interested in obtaining a financial interest in the safflower oil industry through favors or hoped-for favors from Beirn (R. 532-534, 553-560) and indeed that he had bought some stock in the new CDC company of the Bobleys but claimed that later he withdrew his investment (*ibid*); that as early as December 1961 Taller had told him he had protested by registered letter to the Bobleys about their promotional improprieties (R. 564) (which contradicted Grossman's direct testimony, *supra,* that in January 1962 Taller was evasive); and that Grossman was now married to his former assistant Miss Kneerim (R. 577).

Jill Kneerim (Grossman) testified about the incident of July 21, 1961 when Dr. Taller and Milton Stone brought to her, at Simon & Schuster, the changes for the book (R. 703-749)—the incident when Dr. Taller left immediately (*supra*). On cross-examination she confirmed that not only Grossman, but she herself, had been interested in investment possibilities opened up to them by Beirn in connection with safflower oil (R. 777-772, 797, 818-819). Also, Grossman had told her in advance that Beirn would have changes to put into the book for the purpose of mentioning capsules (R. 778-779). But she insisted that Grossman (now her husband) had not told her to expect or to insert, in the book, a change about the Cove Company as a distributor of the capsules, and that she had done this entirely on her own (being then a quite junior

employee of the great publishing house of Simon & Schuster) (R. 788, 795-796).

Milton Stone (R. 832-998), Frances Kenneth Beirn (R. 1095 *et seq.*), Edward Bobley (R. 1343 *et seq.*), and Harry W. Bobley (R. 1650 *et seq.*) all of whom more or less tried to put the blame on Dr. Taller for the indubitable misrepresentation in the CDC capsule promotion, were, of course, accomplice witnesses.

Of quite a different stripe was the witness Roger Kahn, Dr. Taller's ghost writer, called as a witness by the Government (R. 1001 *et seq.*). Kahn said that he had repeatedly confronted Grossman with what seemed to Kahn the most peculiar changes that had been made in the book, and that Grossman had just as repeatedly assured him not to worry and that Simon & Schuster's lawyers had approved everything (R. 1023-1026, 1081-1082).

Similarly Government witness Milton A. Bass, a lawyer for the CDC company (R. 1960 *et seq.*), testified that he was not certain whether he had ever had any discussion with Dr. Taller about the problem of the quantity of safflower oil in the capsules (R. 1978-1979).

The Government also called to the stand Michael H. Haney, a Food and Drug Inspector, through whom charts were put in evidence which compared Dr. Taller's manuscript of the book with the book as published containing the changes here in issue (R. 2027-2072)—Government exhibit 214-A (R. 2072).

The Government called three expert witnesses who, in addition to testifying as to the undisputed insufficiency of the CDC promotion-campaign dosage, also took issue with

Dr. Taller as to the scientific merits of his basic theory. The testimony of these witnesses revealed vividly the disagreement among scientists concering that theory. These expert witnesses were Dr. Rachmiel Levine (R. 2073 *et seq.*, R. 2094-2149, 2156-2312, 2509-2526); Dr. Sydney C. Werner (R. 2324-2398); Dr. S. A. Hashim (R. 2400-2479).

The first defense witness was Leo Brady the Bobleys' attorney, who testified as to Dr. Taller's protests to the Bobleys concerning their promotional efforts (R. 2629-2663).

The defense also called Simon & Schusters' attorney, Selig J. Levitan, who testified that his client had arranged for him to assist Dr. Taller at Medical Society proceedings, and who gave other important testimony denoting that during the operative times Simon & Schuster was supporting Dr. Taller's position of having done nothing wrong (R. 2691 *et seq.*, 2699 *et seq.*; 2700-2742). The defense also called one State and one Federal Food and Drug Inspector, who gave testimony exculpatory of Dr. Taller (R. 2884-2914).

On rebuttal the Government called Leo Greenland, a representative of the Bobleys' advertising agency, who likewise testified to the effect that the Bobleys rather than Dr. Taller were responsible for the misrepresentational promotion campaign (R. 3636-3665).

The defense also called more than twenty witnesses, including numerous physicians, who were or had been patients of Dr. Taller utilizing his form of treatment for weight reduction, all of whom testified enthusiastically in favor of the treatments (R. 2766-2828, 2854-2883, 3322-3341, 3390-3398, 3439-3645, 3674-3837).

Dr. Taller took the stand in his defense, denying all of the charges of the indictment, doughtily defending his basic theory, disavowing his responsibility for the CDC capsule misrepresentation, and also disavowing any responsibility for the changes in the Simon & Schuster book (R. 2915-3077, 3089, 3321, 3341-3389, 3838-3846).

REASONS FOR GRANTING THE WRIT

I. The Irrationality of the Jury Verdict

In assessing the gravity of this reason for certiorari, it is instructive to note in some detail the relevant procedural circumstances in which the jury rendered what we claim was an apparently unprecedentedly irrational verdict.

The trial Court in its instructions to the jury did not marshal the evidence, and it submitted for the jury's consideration all forty-nine counts of this massive indictment (39a *et seq.*). These threshhold facts help to account for the confusion which followed.

The jury evidently had a very difficult time arriving at a verdict, for it deliberated on the case a total of some 20 hours, extending overnight (92a-128a).

During its deliberations, the Jury asked for and was given copious re-instructions as to the law of the misbranding counts, and *twice* as to the law of conspiracy, and it wanted and was given a re-reading of testimony pertaining to Dr. Taller's alleged guilty participation in the making of changes in the book "Calories Don't Count" (96a-101a, 108a-126a).

The Jury verdict was as follows (128a): Of the 45 mail fraud counts, the Jury convicted Dr. Taller on counts 1 through 6, 11 and 25, acquitting him on the remaining 37 mail fraud counts. The Jury convicted on all three of the misbranding counts "as charged", counts 46, 47 and 48. And it convicted on the conspiracy count "as a misdemeanor".

In order to perceive just why the above verdict is bewildering, indeed incomprehensible, it is necessary to consider the following: Insofar as the mail fraud counts are concerned, taken in themselves as substantive counts (without regard to the conspiracy count) the verdict of conviction on eight of those counts and acquittal on the other thirty-seven, admittedly presents nothing more serious than the indicated likelihood of a compromise verdict.* As regards the verdict of guilty "as charged" on the three misbranding counts, and the guilty verdict on the conspiracy count "as a misdemeanor", the situation is much more serious indeed. For, the Court had instructed the Jury on the misbranding counts that they could find either "felony" ("as charged") or "misdemeanor" (52a-53a, 70a, 75a-76a, 87a),** and the Court had also told the Jury that on the conspiracy count their verdict must be guilty or not guilty unless they convicted *only* on the misbranding count "as misdemeanors", in which event they could convict on the conspiracy count "as a misdemeanor". How, then, could the Jury convict for *felony* under the misbranding counts, and also convict for "misdemeanor" un-

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* However, as we argue *infra*, the compromise verdict feature in the entire context of the case does give rise to reversible error.

** The defense had unavailingly objected to letting the Jury consider any reduced offense under the misbranding counts (R. 3858-3862; 90a).

der the conspiracy count? The puzzle becomes even deeper when one reflects upon the relationship between the conspiracy verdict ("misdemeanor") and the guilty verdict on the eight mail fraud counts— as to which latter there could of course be only a felony conviction and no "reduced offense" (nor had the Court instructed the Jury otherwise regarding the mail fraud counts).

Thus, besides the eight "felony" convictions for mail fraud, we have here a jury convicting on three substantive counts (misbranding) "as charged" (*i.e,* felony), yet at the same time returning a "misdemeanor" conspiracy verdict under a conspiracy count which incorporatively charged the same substantive misbranding (and mail fraud) offenses, and in the face of the Court's having expressly instructed the Jury that the only way there could be a conspiracy "misdemeanor" conviction in this case was if there first occurred a misbranding "misdemeanor" conviction.

The situation becomes even more puzzling, if possible, when we lay the conspiracy "misdemeanor" conviction alongside the eight mail fraud convictions. It will be recalled that the conspiracy count incorporatively re-charged, both in the charging part of that count and in the first overt act paragraph, both the mail fraud offenses and the misbranding offenses. Since mail fraud can only be a felony, never a misdemeanor or otherwise "reduced", does not the conspiracy conviction here which is a conviction only for "misdemeanor", necessarily mean on its face that the Jury did not find any conspiracy in regard to the mail fraud counts?

But when we further probe this last aspect of the puzzle, the situation as a whole sinks to a still deeper level of puzzlement. Essentially, all of the really operative scienter proofs in this trial concerning Dr. Taller are the same with respect to the mail fraud, misbranding and conspiracy counts. The prosecution under this indictment was for all practical purposes a prosecution for a single, unified alleged criminal plot to misrepresent that CDC capsules in the prescribed dosage were equivalent to three liquid ounces of safflower oil. How, then, could there be a *conspiracy acquittal in regard to the mail fraud charges* (such being the necessary effect of the conspiracy "misdemeanor conviction"), together with *felony convictions for mail fraud?*

These exceedingly troublesome features of the Jury verdict were extensively argued in the post-verdict motions (R. 4374 *et seq.*). The Trial Court itself expressed bewilderment and deep concern (*ibid*), but after speculating (most ingeniously, we concede) as to various ratiocinations which might serve to rationalize what the Jury had done, the Court decided to leave the verdict undisturbed.

We have not seen any even remotely comparable Jury verdict in any other case. This verdict appears to be unsurpassed for pervasive, irretrievable, fatal irrationality. The familiar case law on "inconsistent verdicts" or "compromise verdicts" does not begin to touch the problems of this verdict. This case must be viewed as having resulted in a total vitiation of the processes of judicial trial under the jury system. When a jury renders a "verdict" such as this, what has occurred is that the jury has not functioned as a "jury" at all; which in turn means that, not only has the defendant been denied a trial by a "fair

and impartial tribunal", but that he has been denied a trial before any "tribunal" at all in the constitutionally required sense of a *judicial* "tribunal".

It may be added that several times in this trial Judge Dooling himself expressed dissatisfaction, bordering on dismay, over the difficulty which he foresaw as to the jury's ability to cope with this indictment, in view of the multiplicity of counts, the confused inter-relationship of the conspiracy count with the substantive counts, and the foreseeable danger of a jury disagreement or compromise verdict (R. 2611, 2613, 2614-2615); see further as to this under Reason II, *infra*.

This jury verdict is probably *sui generis*. The case is apparently unique in the annals. It is not surprising that "precedent" is apparently unavailable for the present situation, because apparently, despite the myriad instances in the past of "inconsistent" or "compromise" verdicts, nothing remotely resembling the present situation has been reported, to our knowledge. It may, however, be recalled that the law is by no means so tolerant as the Courts below evidently thought in regard to "compromise" or "inconsistent" verdicts; the law still forbids such verdicts in sufficiently egregious cases. See *Hyde* v. *United States*, 225 U.S. 347; 53 *Am. Jur.* 714 (*Trial*, §1033). In particular, where as here, a defendant is inconsistently convicted on charges of substantive crime and conspiracy, it has been authoritatively declared that the record should be closely examined for injustice. *Manley* v. *United States*, 283 F. 2d 211, 222 (C.A. 6, 1956).

The Government argued in the Court below that in any event "appellant cannot complain of error on one count

when he received concurrent suspended sentences on several counts" (Govt's Br. p. 34), and the Court below apparently agreed. This oversimplifies the impact of the sentence, since there were cumulative committed fines of $1,000 each on six mail fraud counts and on one misbranding count, and since Dr. Taller was placed on probation for two years under a blanket suspension of imposition of sentence on the remaining conviction counts, or, so far as appears, on all of the conviction counts (134a-135a). This is not, then, a simple case of merely "concurrent" sentences on multiple counts.

In these circumstances it becomes appropriate to view the problem of the irrationality of the verdict in conjunction with the problem of the overwhelming multiplicity of the counts, all of which involve after all a single basic subject matter of alleged fraudulent marketing of a weight reducing preparation. This topic is taken up under our next "Reason."

II. Double or Multiple Punishment

Even if this were an outright case of merely concurrent sentences the irrationality of the verdict considered against the background of the stupefying multiplicity of indictment counts would be a matter of concern under the due process and double-or-multiple punishment protections of the Constitution.

But in view of the multiple or cumulative nature of the punishments here imposed, our reply to the Government's argument in the Court below (apparently accepted there) mistakenly based on the supposedly merely concurrent sentences should here be repeated:—

As mentioned, Judge Dooling expressed strong concern over the difficulty which he foresaw as to the jury's ability to cope with this indictment owing to the multiplicity of counts, the confused inter-relationship of the conspiracy count with the substantive counts, and the danger of a jury disagreement or compromise verdict (R. 2611, 2613-2615). And, already pre-trial, Judge Dooling expressed a candid concern over another difficulty which he foresaw particularly in connection with the conspiracy count, i.e., the problem of guiding the jury in the treatment of the proofs of individual guilt of conspiracy in the light of *United States* v. *Stadter,* 336 F. 2d 326 (C.A. 2 1964), cert. denied 380 U.S. 945. See the pretrial transcript of February 22, 1967, pp. 67-77; and R. 140, 145-146.

In recent decisions (post-dating *Stadter, supra*) the Court below has rather drastically recast the standards for instructions to juries as to the sequence of deliberate steps needed on the part of the jurors (and of the trial Judge) in carrying out the decisional function of determining the individual defendant's guilt of conspiracy and in considering the "hearsay" acts and declarations of co-conspirators as proof of guilt against a particular defendant. *United States* v. *Nuccio,* 373 F. 2d 168 (C. A. 2 1967), cert. denied 18 L. Ed. 2d 623; *United States* v. *Ragland,* 375 F. 2d 471 (C. A. 2 1967). The law in these respects formerly was that the jurors had to be instructed to consider first whether the Government had proved the existence of a conspiracy (for the determination of which the standards of proof and jury instructions were apparently never worked out in a perfectly coherent way as regards consideration of "hearsay"); second, whether the knowing

participation of each defendant in the conspiracy had been proved (which in turn needed to be determined by proof "aliunde" or independent proof as to the acts or declarations of the particular defendant without recourse to "hearsay" as to acts or declarations of other defendants or co-conspirators); and, third, upon determination of the existence of the conspiracy and of a particular defendant's knowing participation therein, the jurors could then consider unlimitedly the co-conspiratorial "hearsay". As to these former requirements, see, *e.g.*, Mathes and Devitt, *Federal Jury Practice and Instructions* (1965), § 25.05 *et seq.*, pp. 236-241.

In our case the trial Judge gave the jury the more simplified instructions favored in the *Nuccio* and *Ragland* cases, *supra* (56a-57a).

In the past, notwithstanding expressions of dissatisfaction even by this Court itself, the Government has almost always been indulged in its zealous practice of combining conspiracy and substantive counts dealing with the same subject matter, but there have been arguably persuasive reasons for allowing this which now seem to us to be no longer applicable in view of the above noted new way that the Court below is apparently disposed to permit trial Judges to charge juries on conspiracy (*Nuccio, Ragland*). If conspiracy instructions no longer need to be concerned with careful delineation as to independent proof of individual membership or as to how hearsay may be considered, then it is hard to see how a conspiracy charge or proof thereof differs meaningfully from a substantive charge involving the same subject matter and more than one defendant.

The idea here being proposed is that, through such virtual equating of the prosecutive-proof procedures for conspiracy and substantive counts, the combining of such counts is indeed duplicitous when the same subject matter is involved.

There are further refinements to this argument. For example, it has traditionally been theorized that prosecutors need the conspiracy weapon in their arsenal because they may not be able to prove actual *achievement* of a crime in the substantive sense but can prove conspiratorial *effort* (proof of success not being necessary for conspiracy conviction). But this argument is unrealistic, and unfair, in a case like the present one where the whole thrust of the Government's proof under all counts was success of the "CDC" transactions.

Another refinement of the argument would be that it used to be important for the Government to be allowed to use conspiracy counts because thereby hearsay could be received which would otherwise be inadmissible. But in view of cases like *United States* v. *Campisi,* 248 F. 2d 102 (C. A. 2, 1957), cert. denied 355 U. S. 892, establishing practically unrestricted admissibility of hearsay on an "agency" theory in prosecutions on substantive charges, the supposed policy need for the conspiracy weapon in the prosecution's arsenal based on these hearsay factors appears to be no longer justified.

If, as we contend, all these reasons of policy which formerly were thought to justify the combining of conspiracy and substantive counts involving the same or practically the same transaction have lost their force, has not the time now arrived when the Courts should perceive the real im-

pingement of these developments on the sheer issue of duplicity and double or multiple punishment in a case of the present kind?

It would be difficult if not impossible to explain to a layman why Dr. Taller is subjected to multiple sentences in this case in light of the case law evolution above described which has apparently eliminated any *sound* continuing justification for doubling-up or multiplying, *via* conspiracy and substantive charges, the criminal punishment of a man in circumstances of the kind here presented. Previously, when the doctrines now obsoletized by cases like *Nuccio, Ragland* and *Campisi* were still in force, the puzzled layman could have been answered by a lawyer or a Judge at least on some basis of authentic-seeming legal theory explaining the apparent double punishment. But is it any longer possible now to give such answers to a layman, or, forsooth, to ourselves as lawyers and Judges? Is it any longer possible to avoid the stark conclusion that, in a case of the present kind, the combining of conspiracy and substantive counts is for all practical purposes an instrument for double or multiple punishment for the same offense?

In this newly evolved stage of the conspiracy-substantive juridical dynamic in the Federal Courts, there also emerges more distressingly than ever before the familiar problem of the intrinsic inflammatoriness, to the minds of lay jurors, of a charge of "conspiracy".

We realize that in *Gore* v. *United States,* 357 U.S. 387, this Court (although by a vote of 5 to 4) adhered to the doctrine of *Blockburger* v. *United States,* 284 U.S. 299, that Congress may attach double or multiple penalties to a "single" criminal transaction where different Congres-

sional interdictions are shown to be violated. But the Court below has indicated its own serious concern about this problem by devoting careful analysis and discussion to it in, e.g., *United States* v. *DeAlesandro,* 361 F. 2d 694 (C.A. 2 1966), cert. denied 385 U.S. 842. Cf. *United States* v. *Ketchum,* 320 F. 2d 3 (C.A. 2 1963), cert. denied 375 U.S. 905.

We submit that, somewhere in the four corners of the protections denoted by the due process and double jeopardy provisions of the Constitution, there ought to be, there must be, a protection against subjecting an accused in a Federal criminal prosecution to duplicitous or multiplicitous charges of crime, if only because the accused is entitled to protection against the prejudicially over-awing effect upon jurors' minds of such double or multiple Grand Jury accusations. The danger and injustice of this are vividly illustrated in the present case not merely by the "compromise" or "inconsistent" nature of the verdict but by its all but incredible irrationality, which went so far as to entail even an outright defiance of the Court's instructions as to how the jury could or could not properly link the misbranding and conspiracy counts.

Nor should the ultimate constitutional questions of due process and double jeopardy in a case of this type be permitted to be reductively disposed of simply on the basis of the ultimate impingement of "concurrent" *versus* "consecutive" or cumulative sentencing. Sheer considerations of clarity and fairness in submitting cases to juries must be given weight. Jurors who are told that they may adjudge a defendant's guilt or innocence under multiple charges arising from a single subject matter are *ipso facto* placed

in a state of mind of more stern potential condemnatoriness in proportion to the number of those multiples. It respectfully seems to us unrealistic to ignore this simple "fact of life" under the jury system.

III. Prejudicial Conduct of the Prosecution Concerning the Issue of the Scientific Validity of Dr. Taller's Basic Nutritional Theory; the Improper Instructions to the Jury Concerning the Expert Testimony which Attacked that Theory

Fundamental fairness, in this intrinsically sensationalistic and inflammatory trial of a nationally known figure who was being held up to obloquy as some sort of unmitigated charlatan, required that the lines of the litigational contest in this criminal prosecution be kept meticulously clean on the Government's part, and that lay jurors not be aroused by appeals to intemperate *and spurious* anti-scientific prejudices.

Notwithstanding the intimations to the contrary by the Court below, there can be no real doubt that the indictment in this case simply did not put in issue the scientific validity of Dr. Taller's basic nutritional and dietary theory of use of polyunsaturated fats to reduce weight. Indeed, the Government conceded pre-trial that it was not challenging that theory in this prosecution and that "The indictment doesn't go that far" (Tr. Feb. 21, 1967, pp. 29-30). The Government's attorney during the pretrial stage (Mr. Dibble) went even further in disavowing the intention to attack the basic nutritional theory. Thus, at p. 32 of the transcript of February 21, 1967, after Judge Dooling had spoken at some further length about the problem of de-

fining the trial issues under the indictment so as to avoid unnecessary protraction of the trial, Mr. Dibble stated:

> "I think a close reading of the indictment avoids the issue of whether the polyunsaturated oils in the three ounce regimen would reduce or not. The indictment restricts itself to the fact that the two capsules before each meal won't do what is claimed for it. * * *"

The Trial Judge and counsel then held further colloquy as to just what would be the trial issue impact in light of this position of the Government narrowing the trial issues (*id.*, pp. 32-33); and then (*id.*, p. 33) the Court specifically directed Mr. Dibble's attention to paragraph 3, subparagraph (1), of Counts one through six of the indictment, which reads, "And the new CDC plan calls for the foods you eat to enable your body to melt down, burn up, take off excess body fat", immediately after which the Court asked Mr. Dibble, "that invokes the general polyunsaturated fats theory, doesn't it?". To which Mr. Dibble replied, "No, I don't think so, your Honor, because it says, 'the new CDC plan,' and the CDC plan was the two capsules before each meal," (*id.*, pp. 33-34). Immediately after this reply by Mr. Dibble, the Court asked Mr. Dibble about subparagraph (2) in the above mentioned paragraph 3 of Counts one through six, which reads as follows:

> "It is not the number of calories consumed, but the kind of calories that we should be concerned with. For example, those of Dr. Taller's patients, troubled with obesity who followed his diet program have, he reports, achieved a substantial weight loss while consuming many thousands of calories each and every day."

Referring to the above item in the indictment and to the similar item in subparagraph (3) of the same paragraph 3, the Court went on to say to Mr. Dibble (*id.*, p. 34) that this "seems to be an attack on what you might call broadly the Taller theory as it was before he was ever introduced to Simon & Schuster and Cove * * *". The Court then further pursued this question with Mr. Dibble, in a closely analytical colloquy as to what the Government must prove under the above quoted subparagraph 2, or under the similar subparagraph 3 referred to in the item last quoted, or in the other subparagraphs of Counts one to six, and finally at pp. 44-45 of the transcript of February 21, 1967, defense counsel (Mr. Kleinman) stated that "the heart of the case" was the question of who was responsible for misrepresenting that the dosage of six CDC capsules a day was sufficient, i.e., this was "the heart of the case * * * unless they are going to say polyunsaturated fats are a lot of nonsense and the whole thing is a fraud, and so this was a device, polyunsaturated fat theory was a device to defraud the people. If that is their position then we will have to meet it". To which Mr. Dibble replied, "Of course the indictment doesn't charge that * * *" (*id.*, p. 45). There then followed further brief colloquy in which it seemed to be settled to everyone's satisfaction that the Government did not intend in this trial to make an issue over the basic scientific validity of Dr. Taller's original nutritional theory (*id.*, pp. 45-46).

From the above colloquy of February 21, 1967 it is perfectly clear that the Government conceded pretrial that the indictment did not reach the issue of Dr. Taller's basic theory. Subparagraphs (1), (2) and (3) of paragraph 3 of counts 1 through 6 of the indictment which were so

exhaustively thrashed out in that colloquy, and as to which both parties and the Court took it as settled that those portions of the indictment did not bring into issue Dr. Taller's basic theory, were the main operative portions of the indictment quoted by the Government at pp. 37-38 of its brief in the Court below as supposedly demonstrating that the indictment did bring into issue Dr. Taller's basic theory.

Despite these unambiguous and emphatic concessions by the Government prior to trial, it then came about, perhaps owing to a substitution of prosecutive personnel occasioned by illness of Mr. Dibble, that in its opening to the jury the Government directly and vigorously attacked Dr. Taller's theory (R. 7-9, 27-28), and thereafter introduced the expert testimony previously cited.

The Government nevertheless argued in its brief (p. 38) in the Court below that its conduct in switching its position was not prejudicial because the Government revealed its change of position at the start of the trial on April 4, 1967 and did not offer its first expert testimony (attacking Dr. Taller's basic theory) until April 21, 1967; for these reasons, the Government argued, Dr. Taller is not entitled to make any claim of "prejudicial surprise". But the Government's argument misses our basic contention in this branch of the case. We are not arguing only "prejudicial surprise". We are arguing, in addition to the unfairness of the Government's conduct in changing its position (which did handicap the defense in preparing virtually at the last moment for a massive issue which everyone thought had been eliminated from the case nearly two months earlier), that this change of position by the Government was on a subject

matter of the most fundamental kind, namely, the question of the theory of the indictment. That is, we are arguing that in the pre-trial colloquy of February 21, 1967 what occurred was, not only a binding commitment or estoppel of the Government as to the scope of the indictment, but that the pre-trial colloquy in question laid down the "law of the case" as to the scope of the indictment. Indeed, we go further and submit that the Government's above described pre-trial concessions of February 21, 1967 represented what was in any event the only possible proper reading of the indictment. The Government's candid Mr. Dibble recognized, in that pre-trial proceeding, that the indictment simply had never been intended to attack Dr. Taller's basic nutritional theory. Mr. Dibble was correct, and in the above cited proceedings of February 21, 1967 he explained in detail why the indictment language must be read as aiming at the CDC program rather than at the basic nutritional program.

Therefore, for the Government to have switched its position as it did at the trial and parade before the jurors the prestigious expert nutritional witnesses who spoke grandly (and inflammatorily) against the basic theory of Dr. Taller —as to which there existed at least a substantial controversiality of scientific opinion—was grievously prejudicial, because in any event this entire branch of the Government's case was outside the issues of the indictment.

This dubious conduct of the prosecution in this case in itself presents a serious issue of prejudicial error, not only because the indictment simply does not reach the question of alleged criminality or criminal falseness of Dr. Taller's basic theory, as the Government conceded pre-trial, but also because the jury were permitted to listen to the Gov-

ernment's fulminations on this forbidden issue. Worse, the jury were regaled with prestigious expert testimony on this intensely controversial subject.

It is established law that expert opinion evidence in the fields of medicine and pharmacology may properly be received on the issue of intent to defraud, but it has also been at least strongly suggested by this Court that such evidence is not sufficient for submission to the jury or for conviction under the rule of reasonable doubt when it relates to a scientific subject matter in which there is controversiality of opinion, or where the scientific picture is in some doubt, or where, indeed, there is less than a "universality of scientific belief that advertising representations are wholly unsupportable". Thus, in *Reilly* v. *Pinkus,* 338 U. S. 269, where the Court affirmed an order enjoining the execution of a post office fraud order (involving a weight-reducing treatment), the Court said (338 U. S. at p. 276):

> "Proof of fraudulent purposes is essential—an 'actual intent to deceive.' See Seven Cases v. United States, 239 US 510, 517, 60 L ed 411, 416, 36 S Ct 190, LRA1916D 164. Consequently fraud under the mail statutes is not established merely by proving than an incorrect statement was made. An intent to deceive might be inferred from the universality of scientific belief that advertising representations are wholly unsupportable; conversely, the likelihood of such an inference might be lessened should cross-examination cause a witness to admit that the scientific belief was less universal than he had first testified."

The Court below distinguished the *Reilly* case, citing *United States* v. *Andreadis,* 366 F. 2d 423 (C.A. 2 1966). The distinction suggested in *Andreadis* was that between

(1) expert medical testimony to establish that certain product claims were false, and (2) such testimony to establish that the claims had been advertised as part of an intentional scheme to defraud. We must respectfully state that *Reilly* v. *Pinkus* does not seem to support this distinction. The Court in *Reilly* spoke undifferentiatedly, as we read the decision (338 U.S. at p. 276), of *any* effort to prove fraud in a case of the present type by resort to expert medical evidence not based upon a "universality of scientific belief". In any event, it should be kept in mind also that, aside from the testimony of the expert witnesses, the only proof of Dr. Taller's alleged participation in the fraud charged came from uncorroborated accomplice testimony (see our Reason IV, *infra*). And above all it must be remembered that the expert testimony in this case went far (and gratuitously, i.e., prejudicially) beyond any proper issue under the indictment, because the expert testimony here dealt not only with the *undisputed* point that the CDC dosage was ineffective, but it dealt also with the whole basic nutritional theory of Dr. Taller, which should not have been in the case at all, as we believe has been demonstrated.*

IV. The Accomplice Testimony Issue

Literally all of the proof which is arguably inculpative of Dr. Taller on the dispositive issue of his guilty scienter, came from witnesses who were co-defendants or who could properly be classified as accomplices or as witnesses who

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* Defense request to charge no. 24 was: "It is not evidence of guilt merely because there may be some dispute among the medical experts as to the medical value of the safflower diet as prescribed by Dr. Taller. Nor is it evidence of guilt merely because Dr. Taller's book did not receive universal recognition."

were agents or representatives of accomplices. The co-defendant witnesses were Harry W. Bobley, Edward Bobley and Francis K. Beirn. The non-defendant witnesses whom we class as accomplices were Richard L. Grossman (the Simon & Schuster vice-president), Jill Kneerim (now Mrs. Grossman and her husband's former assistant at Simon & Schuster), and Milton Stone. The agents or representatives of these co-defendants who testified for the Government were the Simon & Schuster employees Anthony M. Schulte, Seymour Turk and Mac S. Albert; Milton A. Bass, the Bobleys' attorney; and Leo Greenland, a representative of the Bobleys' advertising agency.

At R. 3865 defense counsel broached to the Court that in addition to the co-defendant Bobley brothers and Beirn, "others, for example, Grossman" should be treated as accomplice witnesses. At R. 3871 the Court replied to counsel that as to Grossman, "let's leave Grossman out of it, that's too hard".

At 83a (Appellant's Appendix) the Court instructed the jury that they could regard the Bobleys and Beirn as accomplices, and the Court added that such accomplice testimony could be sufficient "to sustain a verdict of guilty without corroboration in or support of other evidence"; the Court also instructed that such accomplice testimony should be evaluated "having in mind that it is * * * accomplice testimony," and that it "is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt" (83a).

The defense in this trial did not request an instruction that accomplice testimony must be corroborated. However,

since Dr. Taller took the stand and denied all of the inculpative accomplice testimony, we respectfully invoke the principle enunciated in *United States* v. *Persico,* 305 F.2d 534, 536 (C.A. 2 1962), that where the Government's case rests for all practical purposes upon the uncorroborated testimony of accomplices and co-conspirators who had the strongest possible reasons to become Government witnesses, and whose testimony betrayed inconsistencies, the Court must "scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor * * *." To similar effect, see *United States* v. *DeDominicis,* 332 F.2d 207, 210 (C.A. 2 1964), where the sole inculpating testimony was from an accomplice witness and the Court said " * * * trial errors call for close scrutiny."

Also, notwithstanding the failure of the defense in this trial to request an instruction requiring corroboration of accomplice testimony, the circumstances of this case justify us, we submit, in invoking the "plain error" rule for the point of appellate error that the Trial Court should have instructed the jury along those lines. Certain items which the Government in its brief in the Court below meticulously garnered (Govt's Br. pp. 27-33), where the Trial Judge noted the various ways in which the jury could have condemned Dr. Taller by believing the accomplice witnesses, underscore the special sensitivity of the accomplice-testimony problem in this case, where everything depended on what the jury might believe as to who was in fact responsible for the conceded misrepresentational deeds. We respectfully contend that Dr. Taller has not been convincingly inculpated by the accomplice witnesses; and that he is en-

titled at the very least to ask that the testimony of these accomplice witnesses be weighted in scales of a more traditional caliber of justice than that which seems to have become the fashion in the lower Federal courts under the supposed "rule" that accomplice testimony need never be corroborated.

This supposed "rule", as we are about to show, is nothing more nor less than the result of an evolutionary process of misapprehension by various lower Federal courts who have misread the controlling decisions of this Court on the subject. The true and correct (and the just) Federal rule, we shall show, is not that the dispensing with any requirement of corroboration of accomplice testimony is a "rule" of invariable application, but that it is the "better practice" to require corroboration. The circumstances of the present case call for the use of such "better practice" here.

On the present trial record it is fair to state that Dr. Taller has been convicted upon the uncorroborated testimony of accomplice witnesses. The only even ostensible "corroboration" of this accomplice testimony either came from other accomplice witnesses, or from the accomplice testimony as to mailings of documents to Dr. Taller which he swore he never received. It is familiar that in jurisdictions or in decisions where the accomplice-corroboration requirement is applied, accomplices cannot corroborate each other. E.g., *People* v. *O'Farrell,* 175 N.Y. 323, 67 N.E. 588 (1903).

We are not urging the Court to depart in any precedent-shattering way from what is commonly regarded as being the established Federal rule that corroboration of accom-

plice testimony is unnecessary. What we are asking the Court to do is to rule, on the basis of the decisions noted *infra,* that in our particular case justice, fairness and sound judicial discretion required an instruction to the Jury that *none* of the accomplice testimony should be believed unless it was supported by *proper* corroboration.

Holmgren v. *United States,* 217 U.S. 509, 523-524 states that "It is undoubtedly the better practice for Courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". This *Holmgren* language was by the unanimous Court, and it has never since been criticized, disparaged or departed from in any doctrinal sense by this Court in any other decision, including *Caminetti* v. *United States,* 242 U.S. 470, 495-496, which is so often cited (uncritically, we must say) for the proposition that corroboration of accomplice testimony is *never* required in Federal criminal prosecutions. *Caminetti* expressly noted the *Holmgren* rule and said, "This is so", going on to add merely that "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (242 U.S. at 495). Indeed about six months after *Caminetti* the Court in *Valdez* v. *United States,* 244 U.S. 432, expressly undertook to examine whether there had been corroboration of the accomplice testimony (at pp. 440-442). The *Valdez* case arose in the then Territory of the Phillippine Islands; from the report of the decision in *Valdez,* and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. 1242 et seq.) it does not appear that the case involved any statutory or constitutional provision

applicable to the Phillipines Territory which would have expressly required corroboration of accomplice testimony.

While the overwhelming majority of the decisions in the lower Federal Courts have ignored the "better practice" rule of *Holmgren* in recent decades, that rule has from time to time shown a continuing vitality. E.g., *Sykes* v. *United States,* 204 Fed. 909, 913 (C.C.A. 8 1913); *Fain* v. *United States,* 209 Fed. 525, 533 (C.C.A. 8 1913); *United States* v. *Murphy,* 253 Fed. 404, 406 (N.D.N.Y. 1918); *McGinnis v. United States,* 256 Fed. 621, 626 (C.C.A. 2 1919); *Freed* v. *United States,* 266 Fed. 1012, 1014-1016 (D.C. App. 1920); *Wagman* v. *United States,* 269 Fed. 568, 572 (C.C.A. 6 1920); *Morenkow* v. *United States,* 276 Fed. 293, 294 (C.C.A. 6 1921); *Rudner* v. *United States,* 281 Fed. 516, 521 (C.C.A. 6 1922); *Rossi* v. *United States,* 9 F.2d 362, 366 (C.C.A. 8 1925); *Lett* v. *United States,* 15 F.2d 686, 689 (C.C.A. 8 1926). Cf. also the various indications of dissatisfaction with the non-corroboration rule in, e.g., *Arnold* v. *United States,* 94 F.2d 499, 501, 506-590 (C.C.A. 10 1938); *Stewart* v. *United States,* 131 F.2d 624 (C.C.A. 5 1942), cert. denied 318 U.S. 779; *Gordon* v. *United States,* 164 F.2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U.S. 862; *Smith* v. *United States,* 224 F.2d 58, 60 (C.A. 5 1955); *Stanley* v. *United States,* 245 F.2d 427, 433 (C.A. 6 1957); *Osborne* v. *United States,* 351 F.2d 111 (C.A. 8 1965); *Masters* v. *United States,* 351 F.2d 105 (C.A. 8 1965).

Of the cases cited in the preceding paragraph we especially invite attention to the language of the Eighth Circuit in the *Sykes* case *supra;* and to the *Murphy* case from the Northern District of New York, *supra.* In the latter case, the Court, treating the *Holmgren* rule as being still

controlling, and evidently referring to the *Caminetti* case, and to similar decisions of the lower Federal courts, said (253 Fed. at 406) that those cases do "not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached." But when the accomplice witness has been impeached, the *Murphy* Court said, "The Supreme Court, in such instances, as declared in the *Holmgren* case, *supra,* holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence * * *."

We submit that this stalwart and discerning language written in 1918 in the *Murphy* case, *supra,* embodies the correct historical and traditional perspective of the Federal accomplice-corroboration rule, and that it states a theme which this Court should now restate.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
ABRAHAM GLASSER
Attorneys for Petitioner
Herman Taller

[APPENDICES FOLLOW]

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 355—September Term, 1967.

(Argued March 18, 1968 Decided May 1, 1968.)

Docket No. 31594

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERMAN TALLER,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge,* and CLARIE, *District Judge.**

Appeal from a judgment of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* convicting Herman Taller, after a verdict, on three counts of misbranding drugs, eight counts of using the United States mails to defraud, and one count of conspiracy, under a forty-nine count indictment charging him with violations of 18 U. S. C. §§2, 371, and 1341 and of 21 U. S. C. §§331(a), 331(k), 333(b) and 352(a). Affirmed.

* Of the District Court of Connecticut, sitting by designation.

WILLIAM W. KLEINMAN (Kleinman, Gold & Landsman, Brooklyn, N. Y.; Abraham Glasser, of Counsel), *for Appellant.*

CARL GOLDEN, Ass't U. S. Attorney (Joseph P. Hoey, U. S. Attorney, Eastern District of New York), *for Appellee.*

FRIENDLY, *Circuit Judge*:

The appellant, Dr. Herman Taller, a physician who specialized in obstetrics, is the author of the 1961 million-copy best-seller, "Calories Don't Count." This book as originally planned was to be an exposition of Dr. Taller's views, arrived at after some experimentation and research and apparently held with sincerity, that obesity could be cured, without the painful necessity of restricting calorie intake, by regular ingestion of liquid oil containing poly-unsaturated fats. Dr. Taller had been prescribing three ounces of liquid safflower oil per day for his patients, and this dosage appeared in the drafts and galleys of his book. Before the book was published, however, he became involved in an enterprise organized to distribute safflower oil capsules; to create a demand for these he prevailed upon his publisher to change the text so that the recommended dosage would be six capsules per day and to indicate that these could be obtained from the new enterprise. The packages of capsules, in turn, were labelled "C D C" and contained a booklet identifying them with Dr. Taller's " 'Calories Don't Count' Weight Control Program." The revised capsule dosage contained only 1/15

as much safflower oil as the liquid oil dosage originally recommended and, as Taller later admitted, was worthless as a cure for obesity even in terms of his own theory.

Dr. Taller was tried before Judge Dooling and a jury in the District Court for the Eastern District of New York on a forty-nine count indictment. He was found "guilty as charged" on the three counts under the Food and Drug Act for feloniously causing misbranded drugs to be introduced into interstate commerce and for repacking and mislabelling drugs which had been shipped in interstate commerce, and on eight of the forty-five counts under 18 U. S. C. §1341 for using the mails to defraud; he was found "guilty as a misdeameanor" on the conspiracy count under 18 U. S. C. §371. Judge Dooling fined him $1000 each on one misbranding count and six mail fraud counts, suspended imposition of sentence on the remaining counts, and placed him on proobation for two years.

The only point raised on appeal requiring much discussion is the sense to be made of the jury's verdict finding Taller guilty of eleven substantive felonies and one "misdeameanor conspiracy." The latter finding is traceable—though not precisely responsive—to an instruction that as to the conspiracy count the jury could return a verdict of "guilty or not guilty, except that if you conclude that the defendant was guilty only of conspiring to commit the misdemeanor of one or more of . . . the Food and Drug counts, your verdict would take the form 'guilty as a misdemeanor.'"

The judge gave this charge because the second paragraph of 18 U. S. C. §371 provides that

> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

While punishment is a question for the judge rather than the jury, the quoted paragraph made it essential for the judge to know whether if the jury found Taller guilty of consiracy, it had in mind a conspiracy whose only criminal object was the commission of a misdemeanor, as would be the case if the jury decided that the only conspiracy was to misbrand without "intent to defraud or mislead." The jury apparently interpreted the instruction as permitting or requiring it to weigh the gravity of the conspiracy rather than merely to report what it found the objects to be, and, perhaps on the basis that other members may have been free of intent to mislead or defraud, concluded this was a low level conspiracy.

An instruction detailing the limited conditions under which it would have been appropriate to find defendant guilty of a conspiracy punishable only as a misdemeanor might well have reduced the likelihood of jury confusion. However, we cannot see how Taller was prejudiced by the jury's finding him guilty of conspiracy in a manner requiring a lesser sentence on that count than a consistent verdict would have demanded. Taller's suspended sentence on the "misdemeanor conspiracy" verdict was concurrent with the suspended sentences on four of the substantive counts, see *Lawn* v. *United States,* 355 U. S. 339, 359 (1958), and the evidence supporting the eleven guilty verdicts on substantive counts was ample. The verdict

on these counts was not logically impaired by the jury's confusion over "grades" of conspiracy, and even if it had been "[c]onsistency in the verdict is not necessary." *Dunn* v. *United States,* 284 U. S. 390, 393 (1932); *United States* v. *Carbone,* 378 F. 2d 420 (2 Cir.), cert. denied, 389 U. S. 914 (1967).

Appellant urges that the Eastern District of New York was an improper venue for the misbranding counts, presumably because the drugs were actually shipped from New Jersey to other states. However, the indictment charged and the proof showed that the Brooklyn-based ativity of Taller as a principal was the cause of these shipments, and *United States* v. *Bozza,* 365 F. 2d 206, 220-22 (2 Cir. 1966), thus does not assist him. The "misdemeanor conspiracy" verdict, which appellant argues flaws every facet of the conviction, is in no way relevant.

Dr. Taller also objects to the Government's introduction of expert testimony that the entire theory of his weight-reducing diet was unsound, on the ground that the issue was not raised in the indictment and that a Government attorney had conceded as much at a pre-trial conference. However, our reading of the indictment, which accords with Judge Dooling's and defense counsel's at the pre-trial conference, is that it does put the validity of Dr. Taller's theory in issue. While the Government attorney indicated that he thought otherwise, this was treated as a disagreement in the interpretation of the indictment rather than as a waiver by the Government. Furthermore, appellant did not object or request a continuance when the Government made clear in its opening statement that it would introduce such testimony, or when such evidence was actually first introduced seventeen days later.

Dr. Taller contends also that this evidence was inadmissible or was admissible only with cautionary instructions since it did not represent a "universality of scientific belief." However, this testimony "was introduced only to establish that the advertising claims made for [Dr. Taller's diet] were scientifically false and was admissible for this purpose. McCormick, Evidence §§13-15 (1954)." *United States* v. *Andreadis*, 366 F. 2d 423, 433 (2 Cir. 1966). While an instruction that proof of error in Dr. Taller's theory did not establish that his intent was fraudulent would have been proper, the failure to give one was not "plain error."

Finally, we are satisfied that the charge as to the requisite scienter for conspiracy, which appellant attacks, was adequate.

Affirmed.

Appendix B—Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. T. EMMET CLARIE,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

HERMAN TALLER,

Defendant-Appellant,

HARRY BOBLEY, *et al.*,

Defendants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B—Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

Appendix C—Statutes

18 U.S.C. § 2

§ 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. § 371

§ 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. §1341

§ 1341. FRAUDS AND SWINDLES

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

21 U.S.C. § 331 (a), (b), (k)

§ 331. Prohibited Acts

The following acts and the causing thereof are prohibited:

(a) the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

* * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

21 U.S.C. § 333 (b)

Same; with intent to defraud or mislead

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331 of this title, with intent to defraud or mislead, the penalty shall (except in the case of an offense which is subject to the provisions of the proviso to subsection (a) of this section relating to second or subsequent offenses) be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

21 U.S.C. § 352 (a)

§ 352. Misbranded Drugs and Devices

A drug or device shall be deemed to be misbranded—

False or misleading label

(a) If its labeling is false or misleading in any particular.

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No. 245

In the Supreme Court of the United States

OCTOBER TERM, 1968

HERMAN TALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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HERMAN TALLER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of misbranding drugs, eight of forty-five counts of mail fraud, and one count charging a conspiracy to commit those offenses (18 U.S.C. 1341, 371; 21 U.S.C. 331(a), (k), 333(b), 352(a)).[1] The court of appeals affirmed (394 F. 2d 435).

Petitioner was the physician-author of the 1961 best-selling book, *Calories Don't Count,* which ex-

[1] Petitioner was tried alone. The indictment had been dismissed as to other co-defendants (three individuals and two corporations), who had previously pleaded guilty and had been fined. The individual co-defendants, as well as several other witnesses, testified for the government at trial.

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pounded his theory that obesity could be cured, without regard to caloric intake, by the ingestion of safflower oil. As originally drafted, the book recommended a dosage of three liquid ounces of safflower oil per day, which petitioner had been prescribing for his own patients. Before the book was published, however, petitioner, with his co-defendants and others, organized a corporation to market safflower oil capsules. Petitioner then prevailed upon the publisher to change the text so that the recommended daily dosage would be six capsules, which could be obtained from the new enterprise. The packages of capsules, labelled "CDC", contained a booklet identifying them with petitioner's "'Calorie's Don't Count' Weight Control Program." The six-capsule dosage contained only $1/15$ as much safflower oil as the liquid oil dosage originally recommended and, as petitioner later admitted, was worthless as a cure for obesity even in terms of his own theory (See Pet. App. 2–3).

1. Petitioner's principal contention is that there was a fatal inconsistency in the verdict arising from the jury's findings of guilty on three felony misbranding counts and of conspiracy "as a misdemeanor." With respect to the drug misbranding counts, the trial judge instructed the jury that it could convict either as charged (*i.e.* a felony) or, if it found that petitioner had no intent to defraud or mislead, as a misdemeanor (R. 4442–4443, 4474, 4484–4485).[2] This admittedly proper instruction led to the court's further

[2] "R." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

charge that, as to the conspiracy count, the verdict should be guilty or not guilty, "except that if you conclude that the defendant was guilty only of conspiracy to commit the misdemeanor of one or more of * * * the Food and Drug counts, your verdict would take the form, guilty as a misdemeanor" (R. 4506). This instruction was necessitated by the second paragraph of 18 U.S.C. 371, which provides:

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Both courts below held that the apparent inconsistency in the jury's verdicts, which was occasioned by the nature of the charges in this case, did not indicate that petitioner had been denied a fair trial. There is no cause for further review. As the court of appeals observed, the jury could have thought that with respect to the conspiracy, it had to consider the intent, not only of petitioner, but also of the other defendants, while on the substantive counts only petitioner's intent was in issue. There is no reason to believe that the jury did not properly perform its function in determining petitioner's personal intent as to the mail fraud and misbranding counts.

In all events, the verdict does not differ materially from cases where this Court ruled that inconsistent verdicts do not require reversal of convictions. *E.g., Dunn* v. *United States,* 284 U.S. 390; see *United States* v. *Dotterweich,* 320 U.S. 277, 279. As the court ex-

plained in *United States* v. *Carbone,* 378 F. 2d 420, 422–423 (C.A. 2), certiorari denied, 389 U.S. 914:

> The very fact that the jury may have acquitted of one or more counts in a multi-count indictment because of a belief that the counts on which it was [sic] convicted will provide sufficient punishment * * * forbids allowing the acquittal to upset or even to affect the simultaneous conviction. * * * Indeed, if the rule were otherwise, the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others—almost the opposite of the standard instruction, which is obviously beneficial to criminal defendants, and which the judge gave here without objection. It is true * * * that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger. * * *

2. Petitioner's general discussion of the Second Circuit's decisions on the admissibility of hearsay testimony in a conspiracy case has no bearing on the disposition of this case. Although petitioner was tried alone, his concerted action with others in organizing the company and making changes in the book, and the actions of other participants in the scheme, would have had to be proved, even in the absence of a conspiracy count. The addition of the conspiracy count did not subject petitioner to double jeopardy. *Pereira* v. *United States,* 347 U.S. 1, 11; see *Gore* v. *United*

States, 357 U.S. 386; *Callanan* v. *United States,* 364 U.S. 587. And since petitioner's suspended sentence on the conspiracy count was concurrent with the suspended sentences on four of the substantive counts, which petitioner does not challenge, the validity of the conspiracy conviction need not be reached. *Hirabayashi* v. *United States,* 320 U.S. 81, 85; *Lawn* v. *United States,* 355 U.S. 339, 359; *United States* v. *Gainey,* 380 U.S. 63, 65.

3. Petitioner contends that it was prejudicial error to admit the government's evidence discrediting the scientific validity of his dietary theory of use of polyunsaturated fats to cure obesity. The argument is based primarily on the fact that, at a pre-trial conference on February 21, 1967, the Assistant United States Attorney, to whom the case had just been assigned, stated that the indictment did not encompass the question of the scientific validity of petitioner's weight-reducing theory, but only whether the representations regarding the safflower oil capsules were fraudulent in terms of petitioner's own theory (Feb. 21 Transcript, pp. 3, 29–30, 32–34, 45).[3] The trial judge and petitioner's counsel expressed a contrary view, and defense counsel at one point indicated a willingness to meet the broader issue should the government decide to raise it (*id.* at pp. 24, 29–34, 45). The discussion ended with no understanding having been reached (*id.* at pp. 45–46).

In his opening statement at trial (on April 4, 1967),

[3] A copy of this transcript is on file with the Clerk of this Court.

the prosecutor stated that the government would prove, *inter alia,* that petitioner's basic dietary theory was invalid (R. 8–9, 28). The first such proof was not offered until seventeen days later, through one of three expert witnesses who testified on the question. At no time did petitioner request a continuance to enable him to prepare his defense on this issue. The defense called more than twenty former patients of petitioner (some of whom were doctors), who expressed satisfaction with his weight reduction treatments, and petitioner himself testified in support of his basic theory.

The courts below correctly held that the admission of the government's expert testimony was not error. As the court of appeals found (Pet. App. A, p. 5), the indictment, fairly read, "does put the validity of [petitioner's] theory in issue." The government was not estopped from introducing evidence challenging petitioner's underlying dietary theory by the discussion at the pre-trial conference reflecting a disagreement as to the interpretation of the indictment. And the record shows that petitioner was not unfairly surprised or unable adequately to prepare his defense.

Petitioner also argues (Pet. 30–31) that the expert medical testimony was inadmissible or was admissible only with cautionary instructions since it was not based upon a "universality of scientific belief" (*Reilly* v. *Pinkus,* 338 U.S. 269, 276). In *Reilly,* where the evidence was offered to prove fraudulent intent, the Court held that it was error to limit the cross-examination of the government's expert witnesses because the ab-

sence of a "universality of scientific belief" was relevant to whether an inference of such intent could properly be drawn from the evidence. In the present case, as the court of appeals noted (Pet. App. A, p. 6), the "testimony was introduced only to establish that the advertising claims made for [petitioner's diet] were scientifically false and was admissible for this purpose." *United States* v. *Andreadis,* 366 F. 2d 423, 433 (C.A. 2), certiorari denied, 385 U.S. 1001.

4. With respect to accomplice testimony, the court gave the following instruction (R. 4497–4498):

> An accomplice does not become incompetent as a witness because of his participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to sustain a verdict of guilty without corroboration in or support of other evidence.
>
> Yet, bear in mind that accomplice testimony is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt.

Petitioner contends that the foregoing instruction constituted "plain error," under *Holmgren* v. *United States,* 217 U.S. 509, because accomplices furnished all of the arguably inculpatory evidence against him on the issue of guilty scienter (Pet. 31–37). This contention rests primarily on petitioner's unfounded assertion that several of the government's more damaging witnesses, such as the representatives of the

publisher, should be classified as "accomplices" in addition to his co-defendants (Pet. 32). In all events, *Holmgren* held only that it was the "better practice," although not required, for courts to instruct that the testimony of accomplices should not be credited in the absence of corroborating evidence. Petitioner made no request for such an instruction. His attempt to magnify what was at most a failure to adhere to "better practice" into plain error warranting reversal is without merit. *Holmgren* v. *United States, supra; Caminetti* v. *United States,* 242 U.S. 470, 495.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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